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I. Introduction

Since the founding of the Republic, the American political and judicial systems have frequently mediated conflicts between fundamental principles of personal endowment,[1] utilitarianism,[2] and egalitarianism.[3] These confrontations have set interests in personal lib-

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1. Endowment based criteria, utilitarian criteria, and equity criteria are the three dominant measures influencing the just distribution of resources. The personal endowment theory recognizes "a person's innate right to the fruits of his efforts, thereby giving ethical support to the distribution of factor endowment and the pricing of factors on the market." P. MUSGRAVE & R. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 85 (2d ed. 1976). The theory finds expression in the writings of natural law philosophers:

> The earth and all that is therein is given to men for the support and comfort of their being. . . . Yet being given for the use of men, there must of necessity be a means to appropriate them some way or other before they can be of any use . . . to any particular man. . . .
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> Though the earth and all inferior creatures be common to all men, yet every man has a *property* in his own person. The *labour* of his body and the *work* of his hands, we may say, are properly his. Whatsoever, then he removes out of the state that nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath by the labour something annexed to it that excludes the common right of other men.

J. LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL EXTENT AND END OF GOVERNMENT, 16 (Barker ed. 1962).

> [S]ome things there be that can neither be divided nor enjoyed in common. There, the Law of Nature which prescribeth equity requireth: . . . Nature is either *primo geniture* . . . or *first seizure.* [T]hings which cannot be enjoyed in common, nor divided, ought to be adjudged to the first possessor; and in some cases to the first born. . . .

I. HOBBES, LEVIATHAN, Part I, Chap. 15, 94-95 (Great Books ed. 1952). *See also* Pierson v. Post, 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. Sup. Ct.1805).

2. Utilitarianism proposes to distribute wealth as to achieve the greatest sum total of happiness. J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, THE GREAT LEGAL PHILOSOPHERS (1959).

3. Founded upon a humanistic perspective of the worth of each individual, egalitarianism posits that equality of welfare is an inherent value in distributive justice. Rousseau explains:

> All men have a natural right to what is necessary to them. But the positive act which establishes a man's claim to any particular item of property limits him to that and excludes him from all others . . . that is why the right of 'first

erty; freedom of speech, religion and association; property; the work ethic; and the ideals of capitalism have been set against goals of equal opportunity and result.[4] Certain accommodations have been reached and balances have been struck. For example, such native characteristics as race, sex, religion, and ethnic origin have been affirmed as arbitrary and illegitimate qualifications for defined benefits. This, of necessity, has altered the practices of individuals in regards to whom they might hire,[5] with whom they might work and

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occupancy,' however weak it be in a state of nature, is guaranteed to every man. . . .

In order that the right of 'first occupancy' may be legalized, the following conditions must be present. (1) There must be no one already living on the land in question. (2) A man must occupy only so much of it as is necessary for his subsistence.

J.J. ROUSSEAU, THE SOCIAL CONTRACT IX, 187 (Barker ed. 1962). Karl Marx stated the principle thusly: "From each according to his ability, to each according to his needs." K. MARX, *Critique of the Gotham Programer*, THE MARX-ENGELS READER (Tucken ed. 1972). *See also* Goldberg v. Kelly, 397 U.S. 254 (1970); Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues* 74 YALE L.J. 1645 (1965); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

4. *See* J. FISHKIN, JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY (1983)[hereinafter cited as FISHKIN]; A. WESTIN, PRIVACY AND FREEDOM (1970)[hereinafter cited as WESTIN].

Where does the United States fall in this spectrum of socio-political balances. . .? I would term it an egalitarian democratic balance, in which the privacy-supporting values of individualism, associational life, and civil liberty are under constant pressure from privacy denying tendencies toward social egalitarianism, personal activism, and political fundamentalism.

Id. at 27. Justice Harlow eloquently described the balancing under the due process clause:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

. . . [T]he full scope of the liberty guaranteed by the due process clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, (citations omitted). . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting).

5. *See generally* 42 U.S.C. § 2000e-2(a)(1976). *See also* Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 103 S.Ct 3492 (1983) (sex discrimination in retirement plan); Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C. 103 S.Ct 2622 (1983) (sex discrimination in health plan); Snapp & Sons v. Puerto Rico *ex rel Barez*, 458 U.S. 592 (1982); Connecticut v. Teal, 457 U.S. 440, (1982).

publicly associate,[6] to whom they might transfer an interest in property,[7] and what they might say.[8]

While it has been the hope that these authoritative and forceful statements might positively alter the perceptions and perspectives of the relevant populations, regulation has to a large extent focused on expression rather than value formation.[9] Influence has been the stratagem employed to precipitate change in the collective conscience. Contemporaneously, courts and legislatures have secured the rights to individuals to select their spouse,[10] control their ability to procreate,[11] associate privately with whom they desire,[12] and define the home environment.[13] These latter actions often appear similar to the former, yet differ subtly and significantly. They not only affirm rights of expression of individual values but also secure an interest in shared values and family autonomy.

Herein lies a constitutional dilemma. A political structure relies upon the successful cultural integration of individuals for stability. In pursuit of this goal, the United States, as a Democratic Republic, has traditionally recognized the family as a vital organ for the cultivation and transmission of positive social-political values. The family thus is in the service of the government.

Simultaneously, the existence of this small independent political unit insures moderation of the influence of government in its impacts upon individuals. The family serves as a barrier between the person

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6. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980) (affirmative action in construction contracts); International Brotherhood of Teamsters v. United States, 431 U.S. 324, (1977) (racial discrimination in seniority systems); Ticeman v. Whealen - Haver Recreational Ass'n, 410 U.S. 431 (1973); Daniel v. Paul, 395 U.S. 298 (1969)(discrimination in country club violates Civil Rights Act of 1964); Wright v. Salisbury Club. Ltd., 632 F.2d 309 (4th Cir. 1980). *See also* Palmer v. Thompson 403 U.S. 217 (1971) (closing swimming pools in lieu of integration); City of Memphis v. N.T. Green, 951 U.S. 100 (1981) (closing street between racial areas permitted).

7. *See* Sullivan v. Little Hunting Park, 396 U.S. 229 (1969); Shelley v. Kraemer, 334 U.S. 1 (1948); Moore v. Townsend, 525 F.2d 482 (7th Cir. 1975); Fair Housing Provisions of Title VIII of Civil Rights Act of 1968, 42 U.S.C. §§ 3601-31 (1976).

8. *See* Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976) (power to restrict adult theater to certain areas); Public Clearing House v. Coyne, 194 U.S. 497, 508 (1904) (power to exclude from the mail information of a character "calculated to debauch the public morality").

9. *See* Washington v. Seattle School Dist., 458 U.S. 457 (1982); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).

10. *See* Zablocki v. Redhail, 434 U.S. 374 (1976); Boddie v. Connecticut, 401 U.S. 371 (1970); Loving v. Virginia, 388 U.S. 1 (1967);

11. In Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 at 639-40 (1974), the Court stated that it has long recognized that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *See also* Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

12. *See supra* note 7; President of the Village of Skokie v. Collin, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

13. Wisconsin v. Yoder, 402 U.S. 994 (1972). *See also* Stanley v. Illinois 405 U.S. 645 (1972); Ginsberg v. New York, 390 U.S. 629 (1968); Pierce v. Society of Sisters, 268 U.S. 570 (1925); Meyers v. Nebraska 262 U.S. 390 (1923).

and the state. Continued personal freedom may depend on retaining the character of the family inviolate. A healthy deference to pluralism and the acceptance and promotion of diverse and eclectic phyletic value systems assures content to such freedoms as speech, religion, and association.

The constitutional structure is in part however, responsible for the value content of the family phenomenon. Demands of equal protection, due process, and the police power may legitimate curtailing the *expression* of certain values transmitted in the process of socialization.[14]

As President Lyndon B. Johnson noted in a speech at Howard University, "[t]he family is the cornerstone of our society. More than any other force it shapes the attitudes, the hopes, the ambitions and the values of the child."[15]

The statement is, however, an equivocal observation. A stable and enriching family environment full of acceptable values is a vehicle of effective physical and psycho-social development and adaptation. Conversely, the absence of a positive family environment significantly impedes the cultivation of natural abilities. "Ability is not just the product of birth. Ability is stretched or stunted by the family that you live with and the neighborhood that you live in . . ." [16] Inherent in this statement is a recognition that the family is a vehicle for the transmission of such factor endowments as human grace and virtue, wealth, social status, ability, and native characteristics. These may, of course, lead to inequality in opportunity or result among families and individuals. Rawls observes:

> Within the limits allowed by the background arrangements, distributive shares are decided by the outcomes of the natural lottery; and this outcome is arbitrary from a moral perspective. There is no more reason to permit the distinction of income and wealth to be settled by the distribution of natural assets than by historical and social fortune. Furthermore, the principle of fair opportunity can be only imperfectly carried out, at least as long as the institution of the family exists. The extent to which natural capacities develop and reach fruition is affected by all kinds of social conditions and class attitudes. Even the willingness to make an effort, to try, and so to be deserving in the ordinary sense is itself dependent upon happy family and social circumstances. It is impossible in practice to secure equal chances of achievement and culture for those similarly endowed. . . .[17]

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14. Brown v. Board of Educ., 347 U.S. 483 (1954). *See supra* note 7.
15. 1965 PUB. PAPERS at 639 (1966).
16. *Id.* at 636.
17. J. RAWLS, A THEORY OF JUSTICE, 73 (1971).

In an attempt to mitigate both the personal and social adverse influences of natural fortune, courts and legislatures have fashioned theories of affirmative obligation that have permitted state intervention into the composition of family value content. When the family structure begins to dissolve the state has justifiably responded to a request by the participants to assume a role in the reorganization of the unit and the realignment of the several interests.[18] When the consensual character of the relationship deteriorates the state has intervened on behalf of what has been determined to be the best interests of the individual participants.[19]

When, conversely, the internal integrity of the family is sound, the state should exhibit restraint in forcefully interfering with the unit.[20] Such is the demand of democracy. As John Stuart Mill suggested in *On Liberty*,

> [s]ociety can and does execute its own mandates: and if it issues . . . any mandates at *all* in things with which it ought not to meddle, it practices a social tyranny more formidable than many kinds of political oppression, since. . .it leaves fewer means of escapes, penetrating much more deeply into the details of life, and enslaving the soul itself. . . .
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> . . . .
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> The object of this Essay is to assert a very simple principle . . . that principle is, that the sole end for which mankind are warranted individually or collectively, in interfering with the liberty of action of any of their number is self protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.[21]

In recent years the concept of family has been a subject of considerable interest in legal disputes concerning the care of disabled

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18. Boddie v. Connecticut, 401 U.S. 371 (1970); J. GOLDSTEIN & J. KATZ, THE FAMILY AND THE LAW (1965).

19. *See, e.g.*, 42 U.S.C.A. § 608(a)(1); 42 U.S.C.A. § 604(b)(1976); *See also* J. GOLDSTEIN, BEYOND THE BEST INTERESTS OF THE CHILD (1980).

20.

> The family, as the immediate substantiality of mind, is specifically characterized by Love, which is mind's feeling of its own unity. Since in a family, one's frame of mind is to have self-consciousness of one's individuality within this unity as the absolute essence of oneself, with the result that one is in it not as an independent person but as a member.
>
> The right which the individual enjoys or the strength of the family unity and which is in the first place simply the individual's life within this unity, takes on the form of right . . . only when the family begins to dissolve. At that point those who should be family-members both in their inclination and in actuality begin to be self-subsistent persons, and where as they formerly constituted one specific moment within the whole, they now receive their share separately. . . .

G. HEGEL, THE PHILOSOPHY OF RIGHT ¶¶ 158-159 (Great Books ed. 1952)[hereinafter cited as HEGEL].

21. J. MILL, ON LIBERTY, 6, 13 (Kirk ed. 1955)(emphasis added).

citizens within local communities. On January 23, 1984, the Supreme Court of the United States in *Pennhurst State School and Hospital v. Halderman*[22] fueled the fires of concern. However, in all these legal discussions, insufficient attention has been given to a consideration of the functions of the traditional family unit in contemporary society and the cost to the state and its citizenry should the family's influence be enervated or its content eviscerated.

This article focuses on identifying the unique functional qualities of the traditional family unit, suggesting ways that states and municipalities might humanly and humanely proceed to assure that residential facilities are available to accommodate the needs of all community members.

II. The Architectonics of Family

Comprehension of the dynamics of the family unit requires recognition and appreciation of a distinction between norms of composition and norms of association.[23] Norms of composition denominate the overt physio-centric attributes that culture expects of persons who comprise the family unit. The prevailing norm of composition characterizes a man (husband), a woman (wife), and their biological children as a typical family.[24] Why is this a prevalent living arrangement?

> First we must answer that the culture permits it. It allows a man and a woman to formalize their union in a socially prescribed way; they are then socially authorized to have children. Should they have children, they are then responsible, in this society, for rearing them. Proceeding from this requirement, we may then say that society not only permits the formation of family groups but in fact generates considerable pressure toward their formation because it prefers, even though it does not require, that people establish families.[25]

A more generic description of the prevalent norm of composition might define a family as, "a small community composed of a child and one or more adults in a close affective and physical relation which is expected to endure at least through childhood."[26] While

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22. 104 S.Ct. 900 (1984).

23. G. HANDEL, THE PSYCHO SOCIAL INTERIOR OF THE FAMILY, (2d 1972)[hereinafter cited as HANDEL].

24. *Id.* at vii. *See also* J. B. ELSHTAIN, THE FAMILY IN POLITICAL THOUGHT (1982)[hereinafter cited as ELSHTAIN]; B. MALINOWSKI, FREEDOM AND CIVILIZATION (1960)[hereinafter cited as MALINOWSKI]; D. H. J. MORGAN, SOCIAL THEORY AND THE FAMILY (1975)[hereinafter cited as MORGAN]; F. NYE, ROLE STRUCTURE AND ANALYSIS OF THE FAMILY (1976)[hereinafter cited as NYE].

25. HANDEL, *supra* note 23 at 108.

26. J. COONS & S. SUGARMAN, EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL 53 (1978).

myriad consensual living arrangements might meet this description, few would be compatible with the experiences and expectations of society.

Norms of association are those psycho-social perspectives which permit, persuade, or require that individual members of a family relate to one another in defined ways. Custom and law contain the parameters of acceptable social interaction in select relationships. Moreover, the norms of association are formed of patent as well as latent content. Disclosed lines of authority, the functional roles to be filled, and the reciprocal obligations expected among members comprise the patent content. The personal and organizational value constructs expressed in the operations of integrated family units comprise latent content.

This is not to infer an immutability in the schemes of composition or association. Physical, moral, social, and economic forces demand adaptation and variation. Individual participants, however, do develop perceptions and expectations concerning usual relationships. Furthermore, certain themes within kinship are mediated and moderated through the various ideological structures and institutions extant in psycho-social existence. The resulting ideas and ideals shape and define a social reality, and patterns of value stability and principles of legitimacy develop. Concurrently, patterns of social and political stability evolve.[27]

For example, an individual who enters a defined consensual relationship such as marriage has probably assimilated certain traditional and consistent community perspectives concerning the meaning of the relationship. Furthermore, such an individual will probably transmit a facsimile of that value structure to persons subject to his influence.[28] This archetypal phenomenon is a tendency to form representations of a family motif, which though varying in detail, retains its basic pattern.

> [W]e all see, hear, smell, and taste many things without noticing them at the time, either because our attention is deflected or because the stimulus to our senses is too slight to leave

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27. MORGAN, *supra* note 24.

28.

> The benefits of freedom which man derives from his domestic institution depend upon the fact that all the manifold rules of common life are integrated into a system. This system again is related to certain biological endowments of the human organism, which supply the specific drive and psychological controls of the culturally defined rules of creation and law. The family starts with marriage. Under conditions of culture the attraction of sex is transformed into a social fact by the Law of Marriage. There is not a single culture . . . where the permanent cohabitation of men and women and legitimate procreation do not demand a contract which defines the relations of husband and wife as well as parents and children.

MALINOWSKI, *supra* note 24, at 116.

a conscious impression. The unconscious, however, has taken note of them, and such subliminal sense perceptions play a significant part in our everyday lives. Without realizing it, they influence the way we react to both events and people.[29]

Courts grappling with the precept of family have tended to neglect the interdependence of the focal standards. In deference to personal liberty, the nominal cynosure has been the elements of composition and, to a lesser extent, patent associational content. As a result, courts occasionally have considered large, unigenerational, unisexual groups that occupy a single unaltered dwelling unit and that cook and eat together the functional equivalent of the family. [30] The risks of such an open consensual definition are the degradation of interests in privacy and the compression of liberty — all allegedly, in the service of liberty.

Why might this occur? Evidence exists that within a particular compositional motif, patent and latent associational content can vary substantially without introducing instability into the unit. Conversely, minor change in composition necessitates significant alteration in the norms of association with an attendant instability in the social structure of which the unit is a part.[31] To fully appreciate the equation, requires understanding of the function of families in our culture.

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29. C. JUNG, MAN AND HIS SYMBOLS 34 (1964).

> There are *many reasons why we forget things that we have noticed or experienced; and there are just as many ways in which they may be recalled to mind.* An interesting example is that of *cryptomnesia*, or "*concealed recollection.*" An author may be writing steadily to a preconceived plan, working out an argument or developing the line of a story, when he suddenly runs off at a tangent. Perhaps a fresh idea has occurred to him, or a different image, or a whole new sub-plot. If you ask him what prompted the digression, he will not be able to tell you. He may not even have noticed the change, though he has now produced material that is entirely fresh and apparently unknown to him before. Yet it can sometimes be shown convincingly that what he has written bears a striking similarity to the work of another author — a work that he believes he has never seen.
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> I myself found a fascinating example of this in Nietzsche's book *Thus Spake Zarathustra*, where the author reproduces almost word for word an incident reported in a ship's log for the year 1686. By sheer chance I had read this seaman's yarn in a book published about 1835 (half a century before Nietzsch wrote); and when I found the similar passage in *Thus Spake Zarathustra*, I was struck by its peculiar style, which was different from Nietzsche's usual language. I was convinced that Nietzsche must also have seen the old book, though he made no reference to it. I wrote to his sister, who was still alive, and she confirmed that she and her brother had in fact read the book together when he was 11 years old. I think, from the context, it is inconceivable that Nietzsche had any idea that he was plagiarizing this story. I believe that fifty years later it had unexpectedly slipped into focus in his conscious mind.

H. BLOOM, THE ANXIETY OF INFLUENCE (1973).

30. LaPorte v. City of New Rochelle, 2 A.D.2d 710, 152 N.Y.S.2d 916 (1956) (sixty students in dormitory held single family use); Robertson v. Western Baptist Hosp., 267 S.W.2d 395 (Ky. 1954).

31. HANDEL, *supra* note 23.

III. A Cultural Description of Family

The contemporary tendency in America is toward an open, multilineal conjugal family structure. The transitory and impersonal character of an industrial occupational system places unique emphasis on the conjugal bond as an emotional counterinfluence. Consequently, a key reference is the marital relationship between a man and woman, accentuated by a preference for freedom in choosing a mate. Further, the social and geographic mobility demanded by employment patterns militate against the dominance of an extended family structure and in favor on the nuclear family. The residential pattern is, therefore, neolocal.[32]

While an ethic favoring personal liberty in association has encouraged trends toward greater recognition of consensual relationships, friendships, neighborhood ties, and kinship structures have not been perceived as co-equal.

> [W]hat we are suggesting is that friendship has tended to rest on free choice and affectivity. Neighborhood ties, face to face contact and, kinship structures, permanent relations. There is no reason at any moment in time why all primary groups could not overlap. However, the main point of the discussions is that there are pressures in an industrial society for each of these groups to separate.[33]

Accordingly, family bonds are not limited to conventional social relationships but are perceived as relating to certain fundamental processes. This is not to suggest a scheme of biological determinism, but rather to acknowledge an overlap of biological facts and the social influences that cradle and cultivate propinquity.[34] Sexual intimacy, the decision to cohabitate, marriage, procreation, adoption, child-rearing, forms of holding property, and wealth distribution through schemes of inter vivos retention or testamentary transmission of property (i.e., forms of patent content) combine to breathe life into the concept of family. The unique association is punctuated with moral claims and obligations, sentiment, reciprocity, demand, dependence, and trust and cannot be dissolved by mere withdrawal of consent. Kinship is a living relationship sustained through use.

IV. The Functions of Family

A family is a psycho-technical coalition founded upon ideas and

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32. MORGAN, *supra* note 24; WESTIN, *supra* note 4.

33. E. LITWAK AND I. SZELENYI. *Primary Group Structures and Their Functions: Kin, Neighbors and Friends, reprinted in part in* M. ANDERSON, SOCIOLOGY OF THE FAMILY (1971).

34. MALINOWSKI, *supra* note 24; MORGAN, *supra* note 24.

ideals of authority, responsibility, and identification. It serves as:

1. an economic unit of production and consumption;
2. a vehicle for socialization of children; and
3. a vehicle of stabilization of the adult personality.[35]

Through a process of bargaining and socialization, the unit differentiates in order to fill cognizable roles and to perform necessary indigenous functions. Notwithstanding pop culture, ample evidence indicates that the notion is not sex dependent. As patent and latent associational content need not be fixed, a particular function, over time, may be performed by different individuals or, consistent with the demands of the occasion, an individual may perform more than a single role simultaneously.[36] The concern is, therefore, with a differentiation of function and the qualities of fulfillment by arrangement. The issue is not one of specialization or disequalization of persons.

As an economic unit, the traditional family is often composed of laboring and non-laboring individuals. Those with diminished labor capacity, such as the very young, the very old, or the disabled, contribute the values of affection, enlightenment, and rectitude to the household. In reciprocation they are the beneficiaries of an intra-family redistribution of the accessions of labor.

Others contribute labor power. This resource may be directed inwardly to a production of imputed value to be consumed within the economic unit. Alternatively, it may be directed outward to the production of income to be returned to the family and shared by the members.

For example, participants may grow their own food, build their own shelter, and personally care for the dependency needs of certain of their number. Alternatively, they may barter or sell their labor to secure the resources with which to purchase goods and services. While these nominal economic functions may appear to be freely transferable between traditional families and other more loosely structured groups, the latent associational content is not. Therefore, dependency of an individual member upon one outside the unit for support (for example, a social service agency) would necessarily alter norms of association within the unit.[37] The nature, source, and intensity of the propensity to share values distinguishes a family from other consensual associations. The legal, moral, and psycho-social

35. The relationship between family and the other components of society has been diagrammatically expressed by N. BELL AND E. VOGEL, A MODERN INTRODUCTION TO THE FAMILY 10 (1968), as follows:

36. MORGAN, *supra* note 24; NYE, *supra* note 24.

37. King v. Smith, 392 U.S. 309 (1968); Wyman v. Jones, 400 U.S. 309 (1971); *See* Linn County v. City of Hiawatha, 311 N.W.2d 95 (Iowa 1981).

prescriptions that promote the recognition in family of an obligation to cooperate vary markedly from the perspectives of free, voluntary, and episodic decisions to contribute to collective welfare.[38] Family connotes duty, reciprocity, and a claim to performance.[39]

The consequences of a decrease in the marginal value of individual labor units as a result of the realignment of living arrangements will not receive extended discussion.[40] Assessment of the risks of such an effect on residential character would, however, be propitious. Should individuals of independent financial capacities combine resources to purchase living space, the marginal cost of single-dwellings could rise to meet the increasing capacity. A market for consensual living arrangements may thus adversely effect the market for traditional living arrangements. Were this to occur, the traditional single family might become even less able to afford a traditional single-family dwelling. Competition between the physical arrangements might reduce the availability of single family dwellings and/or alter the norms of association of family by inducing outward expression of labor power, converting domestic labor to external labor or forcing non-laboring persons to assume a laboring role. Any of the consequences might cause a shift in focus to economic concern at the expense of psycho-social values.

Such was the concern in Village of Belle Terre v. Boraas.[41] Appellants' brief noted that four independent students living in a consensual arrangement could, as a group, afford to pay more for a given space than could a traditional family with a single wage earner.

V. Psycho-Social Development

Within the socialization-interaction process there are two inte-

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> The right of individuals to their *particular* satisfaction is . . . contained in the ethical substantial order, since particularity is the outward appearance of the ethical order — a mode in which the order is existent.
>
> Hence in this identity of the universal will with the particular will, right and duty coalesce, and by being in the ethical order, a man has rights in so far as he has duties, and duties in so far as he has rights.
>
> The ethical substance, as containing independent self-consciousness united with its concept, is the actual mind of a family. . .

HEGEL, *supra* note 20, at ¶¶ 154-156.

39.

> Culture bases its decrees on innate tendencies and transforms these latter into rules sanctioned also by an organized vigilance of the community. In saying this we do not personify culture but merely state the universal facts of . . . social organization. We must also realize that human cultures, like any other evolutionary phenomena, are subject to the laws of competition and those of the survival of the strongest forms or organization.

MALINOWSKI, *supra* note 24 at 117.

40. ELSHTAIN, *supra* note 24, at 199.

41. 416 U.S. 1 (1974).

gral functions: the individuation of the person; and internalization of culture as it is mediated through the nuclear family.

While human nature may not be biologically fixed, neither is it a mere shadow of cultural patterns. It is a product of historical bio-social evolution. The factors influencing development are generally classified within one of three groups. First are those strivings and character traits by which persons differ from one another. These are malleable, show elasticity, and develop as a reaction to life conditions. They include a capacity for compassion or a lust for power; an integrated sense of self worth or a desire for self aggrandizement; a propensity toward selfless action or a passion for thrift; an enjoyment of sexual pleasure or a fear of sensuality. The distribution and experience of select features are particularly susceptible to the influence of the environment into which the individual is thrust upon birth.

Second are those needs which find root in physiological organization. Third is the gregarious need to be related to the outside environment and to avoid the loneliness of independence.[42] In a utilitarian sense, man needs co-operation to provide for adequate defense and to work for self-preservation. Much of this has been described as an economic role of the family. In addition, through his subjective self conscious (that is the faculty of thinking by which man is made aware of himself and consequently his separation from nature and other human beings) he gains a sense of insignificance. "To feel completely alone and isolated leads to mental disintegration just as physical starvation leads to death."[43] As described most forcefully in the following passage from *La Comédie Humaine: Illusions Perdues*, by Honoré De Balzac:

> Now, learn this; carve it on that soft brain of yours: man has a horror of solitude. And of all solitudes, moral solitude is that which terrifies him most. The first hermits lived with God; they inhabited the most populous of worlds,—the spiritual world. Misers inhabit a world of fancy and possession; a miser has all, even his sex, in his brain. The first desire of man, be he a leper or a galley-slave, infamous or diseased, is to have a sharer in his fate. To satisfy that desire, which is existence itself to him, he employs his whole strength, his every faculty, the very sap of his life.[44]

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42. E. FROMM, ESCAPE FROM FREEDOM (1941)[hereinafter cited as FROMM]; *See also* E. ERIKSON, CHILDHOOD AND SOCIETY (2d ed. 1963); MALINOWSKI *supra* note 24.

43. FROMM, *supra* note 42, at 34.

44. H. DE BALZAC, LA COMÉDIE HUMAINE 381 (Wormeley ed. 1896). For a different translation providing additional insight, see THE NOVELS OF BALZAC, LOST ILLUSIONS 347 (Centenary edition):

> But, learn this, carve it on that still so soft brain of yours — man dreads to be alone. And of all kinds of isolation, inward isolation is the most appalling. The early anchorite lived with God; he dwelt in the spirit world, the most populous

Unless an individual can find coalescence in the formation of a group family bond, he risks being overcome by this diminution of self.[45]

A. Ontogenesis

Upon birth a child becomes physically separate and individuated from his mother, yet the two remain functionally a single unit for a considerable period. He is fed, carried, and taken care of; functionally, the umbilical cord is not severed. Initially, the child is unable to differentiate himself from his parents, and in this ignorance the personality finds security. Simultaneously, the neonate is viewed psychologically as a possession of the family. The reciprocal sense of belonging characteristic of this stage of development (prior to psychic individuation) is indispensable to a later capacity to relate successfully to a social environment.[46]

Self-love or narcissism works toward the preservation of the individual, but the aggression which is indigenous to such an emotion vanishes in the family. The child learns to identify with family structure and the individuals who compose the unit. A reason for this alteration is the phenomenon of libidinal bond formation. "Love of one's self knows only one barrier—love for others, love for objects."[47] Love fosters a change from egoism to altruism, and the libido "attaches itself to the satisfaction of the great vital needs, and chooses as its first object the people who share in that process. And in the development of mankind as a whole, just as in individuals, love alone

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world of all. The miser lives in a world of imagination and fruition; his whole life and all that he is, even his sex, lies in the brain. A man's first thought, be he leper or convict, hopelessly sick or degraded, is to find another with a like fate to share it with him. He will exert the utmost that is in him, every power, all his vital energy, to satisfy that craving; it is his very life. But for that tyrannous longing, would Satan have found companions? There is a whole poem yet to be written, a first part of *Paradise Lost;* Milton's poem is only the apology for the revolt.

45. *See* FROMM, *supra* note 42. *See also* E. JONES, THE LIFE AND AND WORK OF SIGMUND FREUD 341 (1968), *quoting* S. FREUD, CIVILIZATION AND ITS DISCONTENTS, THE MAJOR WORKS OF SIGMUND FREUD 778, 780 (1952)[hereinafter cited as FREUD, DISCONTENTS]:

> The substitution of the power of a united number for the power of a single man is the decisive step towards civilization. The essence of it lies in the circumstance that the members of the community have restricted their possibilities of gratification, whereas the individual recognizes no such restrictions. The first requisite of a culture, therefore, is Justice, that is, the assurance that a law once made will not be broken in favor of any individual.

46. *See* C. BRENNER, AN ELEMENTARY TEXTBOOK OF PSYCHOANALYSIS (1957); J. FLUGEL, MAN, MORALS AND SOCIETY (1945); FREUD, DISCONTENTS, *supra* note 45; S.FREUD, GROUP PSYCHOLOGY AND ANALYSIS OF THE EGO (1971)[hereinafter cited as FREUD, GROUP PSYCHOLOGY]; H. MARCUSE, ENDS AND CIVILIZATION (1955); P. ROAZIN, FREUD: POLITICAL AND SOCIAL THOUGHT (1968); THE NEW STANDARD EDITION OF THE COMPLETE WORKS OF SIGMUND FREUD (J. Strachey, ed. 1953); K. HORNEY, NEW WAYS IN PSYCHOANALYSIS (1966).

47. FREUD, GROUP PSYCHOLOGY, *supra* note 46, at 43.

acts as the civilizing factor."[48]

There are, in fact, two libidinal bonds; namely object cathexis and identification. Object cathexis is what one would like to have; identification is what one would like to be. The former can be observed in normal love relations; the latter in affective alliance. Object cathexis, inhibited in its aim, is the tie which binds child to parent, the prime political unit. Identification can become "a substitute for libidinal object tie as it were by means of introjection of the object into the ego; and it may arise with any new perception of a common quality shared with some person who is not an object of the sexual instinct."[49] Such is the force binding siblings and larger constituences. During this development the family mediates the impact of social values upon the individual.

> Thus the mode of life, as it is determined for the individual by the peculiarity of an economic (or political) system, becomes the primary factor in determining his whole character structure, because the imperative need for self preservation forces him to accept the conditions under which he has to live . . . . [P]rimarily his personality is molded by the particular mode of life, as he has already been confronted with it as a child through the medium of the family, which represents all the features that are typical of a particular society . . . .[50]

The family is not, however, isolated. It is linked to a larger system through the social contacts of its members. Eventually, through biological maturation and mental enlightenment, the child finds himself leaning less on the authority of his parents (to be differentiated from a regressive reliance upon authority which may appear later in the life cycle). That which was begun in the family is perfected in society.[51] The more a child grows stronger physically, emotionally, and mentally, the greater his quest for total independence and freedom from the restraining parental bonds; and each of these spheres becomes both internally as well as externally more active and integrated.

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48. *Id.* at 44.
49. *Id.* at 49.
50. FROMM, *supra* note 42, at 33.
51.

> To the present generation of historical and political writers it has become increasingly clear that people not only seek their interests but also express and even in a measure define themselves in politics; that political life acts as a sounding board for identities, values, fears and aspirations. . . .I have no interest in denying the reality or even the primacy of the problems of money and power, but only in helping to define their reality by turning attention to the human context in which they arise and in which they have settled.

R. HOFSTADTER, THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS: IX-X (1965).

> An organized structure guided by the individual's will and reason develops . . . . The limits of the growth of individuation and the self are set, partly by individual conditions (heredity), but essentially by social conditions . . . . For although the differences between individuals in this respect appear to be great, every society is characterized by a certain level of individuation beyond which the normal individual cannot go.[52]

The family experience is not, however, uni-dimensional. Parents and siblings also experience psychological and physical disruption and attendant growth. Interaction of family members serves cognitive, cathectic, and evaluative goals. Adjustment to the event of birth and orientation to the growth process contribute to the ultimate unique stability of the family structure. Parents are able to interact with children. They have an opportunity to experience love, duty, nurturing, jealousy, constraints of time, altruism, feelings of mortality and immortality, and life and death, all within a defined, stable, and relatively secure construct. Further, they are able to act out child-like or childish elements in their personalities in a legitimate setting. Because parents are able to combine elements of duty and pleasure, the family is a vehicle of continued growth for and stabilization of the adult personality.[53]

The question arises to what extent this process of socialization depends upon the institution of the nuclear family. Responses are value-contingent and rest on individual notions of cognition, emotion, morality, and social and political preference. A substantial consensus holds, however, that the nuclear family functions differently from other groups, and that it has had a profound influence on the evolution of American society.

The important point is the near universality of the limitation of

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52. *Id.* at 44.

53. For another perspective advocating the abolition of the family and the take-over of child rearing by the state, see K. MARX & F. ENGELS, MANIFESTO OF THE COMMUNIST PARTY 427 (50 Great Books ed. 1950):

> Abolition of the family! Even the most radical flare up at this infamous proposal of the Communists.
>
> On what foundation is the present family, the bourgeois family based? On Capital, or private gain. . . .
>
> The bourgeois family will vanish as a matter of course when its complement vanishes, and both will vanish with the vanishing of Capital.
>
> Do you charge us with wanting to stop the exploitation of children by their parents? To this crime we plead guilty.
>
> But, you will say, we destroy ;the most hallowed of relations when we replace home education by social. . . .
>
> The Communists have not innovated the intervention of society *in education*; they do but seek to alter the character of that intervention. . . .
>
> The bourgeois clap about the family and education, about the hallowed correlation of parent and child, becomes all the more disgusting, by the action of modern society.

See also MORGAN, *supra* note 24, at 33.

> variability to such narrow limits both with respect to function and to structural type (of living arrangement). Why is not initial status-ascription made on the basis of an assessment of individual organic and personality traits? Why is not all child care and responsibility sometimes placed in the hands of specialized organs just as formal education is? Why is not the regulation of sexual relations divorced from the responsibility for child-care and status-ascription? Why are kinship units not patterned like industrial organizations? It is, of course, by no means excluded that fundamental changes in any or all of these respects may sometimes come about. But the very fact that they have not yet done so in spite of the very wide variability of known social systems in other respects is none the less a fact of considerable importance.[54]

As a small sexually diverse, intergenerational, bio-sociological group, the family is perceived as playing a distinctive and original role in ontogenesis. It serves not only to nurture its members, but also, through identification, as a paradigm of neighborhood.

B. Phylogenesis

The relationship between society and the family is equiparant and interdependent. The norms of association that develop between child and parent are transported, transposed, inculcated, and expressed in the relationship of population to polity. Phylogenesis significantly follows and depends upon critical ontogenesis.

> From the communal child-rearing in Plato's *Republic* to the test tube nurseries in Huxley's *Brave New World*, the replacement of the family with some alternative strategy of child-rearing has been the centerpiece of any social engineering that required complete manipulation of human development. As long as the private sphere of liberty is in place, crucial developmental factors are entrusted to the autonomous decisions of families and are, by that very fact, insulated from social control. Whether the efforts at social engineering are aimed at equalization or hierarchy, the family constitutes a crucial barrier to the manipulability of the causal factors affecting human development.[55]

The significance of housing patterns on this design should not be underestimated. When an individual seeks a dwelling unit in a single family environment a reasonable expectation is that occupancy will permit participation in a traditional neighborhood value structure. The desire is to share common experiences, dreams, and goals, and thereby fulfill the need for identification. The concept of family,

54. T. PARSONS, THE SOCIAL SYSTEM 155 (1964).
55. FISHKIN, *supra* note 4 at 65.

therefore, extends beyond the physical bounds of property and into the psycho-social eidolon of neighborhood. The introduction of certain consensual living arrangements through application of a noncritical definition of family could lead to a destabilization of traditional family values and ultimately a subtle weakening of the social and political bonds of the state.

VII. The Judicial Vista

The Supreme Court in *Village of Belle Terre v. Boraas*,[56] recognized the validity of land use in support of family values and family residential patterns. Justice Douglas, writing for the Court, stated:

> The regimes of boarding houses, fraternity houses and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked, noise travels with crowds. A quiet place where yards are wide, people few and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs.[57]

Justice Douglas did not, however, confine his perceptions to mere physical characteristics. The Court's concept of public welfare is not so narrow. "The values it represents are spiritual as well as physical, aesthetic as well as monetary."[58] Justice Douglas continued: "The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where *family values, youth values* and the blessings of quiet seclusion and clean air make the area a *sanctuary* for people."[59]

Justice Powell in *Moore v. City of East Cleveland*,[60] described the relatively consistent view of the family held by the Supreme Court: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is rooted in this nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[61]

As a result of the rather unwavering perspective of the Supreme Court and the perception that the concerns of community should be the subject of local initiative and accommodation, the focus on developing images of residential use has, in recent years, shifted to the states and municipalities. Due to the diversity of values involved and

56. 416 U.S. 1(1974)
57. *Id.* at 9.
58. Berman v. Parker, 348 U.S. 26, 33 (1954).
59. 416 U.S. at 9 (emphasis added).
60. 431 U.S. 494 (1977).
61. *Id.* at 503-04.

the complexity and variety of living arrangements at issue, no consistent or uniform solutions have appeared.

The point of departure has been, however, the concept of residential zoning, the essence of which demands a competent definition of family. This is not to infer that family residential use should be equated to or treated as synonymous or co-extensive with other forms of residential living. Indeed, some of the greatest difficulties have arisen when the varied qualities of residential life were ignored and no attempt was made to identify the myriad values and facts inherent in and expressed by varied living arrangements.[62]

The numerous state schemes find classification in one of the following five categories or a permutation or combination thereof.

1. A family residential area is reserved by municipal ordinance with no explicit definition of family provided.[63]

2. A family residential area is reserved by municipal ordinance with family defined as individuals living together and related by blood, marriage or adoption.[64]

3. A family residential area is reserved by municipal ordinance with family defined as a single housekeeping unit.[65]

4. A family residential area is reserved by municipal ordinance with a definition of family provided; however, the definition is superseded in select circumstances by municipal ordinance or state legislation.[66]

5. A family residential area is reserved, with or without defining family, with judicial interpretation of the state constitu-

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62. 71 A.L.R. 3d 693 (1976). *See generally* 2 WILLIAMS, AMERICAN LAND PLANNING 52.01 (1974)[hereinafter cited as WILLIAMS].

63. *See* Riverside v. Reagan, 270 Ill. App. 355, (1933); Stafford v. Incorporated Village of Sands Point, 200 Misc. 57, 102 N.Y.S.2d 910 (Sup. Ct. 1951); Sullivan v. Anglo-American Inv. Trust Inc., 89 N.H. 112, 193 A. 225 (1937); Planning & Zoning Comm'n v. Syanon Found. Inc., 153 Conn. 305, 216 A.2d 442 (1965).

64. *See* Kirsch Holding Co. v. Manasquan, 59 N.J. 241, 281 A.2d 513 (1971); City of Newark v. Johnson, 70 N.J. Super. 381, 175 A.2d 500 (1961); Roundup Found., Inc. v. Board of Adj., 626 P.2d. 1154 (Colo. App. 1980); Penobscot Area Housing Dev. Corp. v. City of Brewer, 434 A.2d 14 (Me. 1981); White Plains v. Ferraioli, 34 N.Y.2d 300, 357 N.Y.S.2d 449, 313 N.E.2d 756 (1974); Des Plaines v. Trottner, 34 Ill. App. 2d 432, 216 N.E.2d 116 (1966). *But see* 24 ILL. ANN. STAT. ¶ 11-13-1(a) (Smith-Hurd 1982 Supp.); Region IV Client Management, Inc. v. Town of Hampstead, 120 N.H. 885, 424 A.2d 207 (1980).

65. Mongony v. Bevilacqua, 432 A.2d 661 (R.I. 1981); Theta Kappa, Inc. v.Terre Haute, 141 Ind. App. 165, 226 N.E.2d 907 (1967)(fraternity house with fifty-nine members not a family); Robertson v. Western Baptist Hosp., 267 S.W.2d 395 (Ky. 1954)(twenty nurses in residence considered family); Neptune Park Assoc. v. Steinberg, 138 Conn. 357, 84 A.2d 687 (1951); Carroll v. Arlington County, 185 Va. 575, 44 S.E.2d 6 (1947)(woman living alone in a house with servants found to be one housekeeping unit).

66. City of Los Angeles v. California State Dep't of Health, 63 Cal.App.3d 473, 133 Cal. Rptr. 771 (Ct. App. 1977); Glennon Heights, Inc. v. Central Bank & Trust, 658 P.2d 872 (Colo. 1983); Adams County Ass'n for Retarded Citizens, Inc. v. Westminster, 580 P.2d 1246 (Colo. 1978); State *ex rel.* Thelen v. City of Missoula, 168 Mont. 375, 543 P.2d 173 (1975); Brandon Township v. North-Oakland Residential Serv., Inc., 110 Mich. App. 300, 312 N.W.2d 238 (1981); Malcolm v. Shanie, 95 Mich. App. 132, 290 N.W.2d 101 (Mich. App. 1980). *But see* Garcia v. Siffrin, 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1969).

tion rejecting restrictive definitions.[67]

Many of the cases have been collated and analyzed elsewhere.[68] Notwithstanding, certain observations may be offered. First, the decisions are inconsistent. The more specific the definition of family, however, the more courts have felt constrained in interpretation and application.

Second, while a number of courts have made a limited attempt to identify the functional qualities of family, most do not look beyond the most superficial patent associational content. The more extrinsic the perception, the more permissive the interpretation. The more indiscriminate the interpretation, the greater the difficulty in successive cases with varied and disparate facts.

Third, courts seem to be haunted by an irreconcilable tension between securing factor endowments[69] and vindicating egalitarian claims.[70] Peculiar to this dilemma is an acknowledged social responsibility, derived from the concept of family, to provide adequate care for the less fortunate members of the community. The resulting ambivalence often results in judicial and intellectual analytical paralysis.

Fourth, in adjudicating individual controversies, courts often weigh the common duty of government to care for all its citizenry against the parochial interest of a particular property owner or neighborhood. Lost is the general cultural interest in preserving the integrity of a family environment for the benefit of society. Accordingly, the burden of mediating and vindicating social claims is imposed on small private units.

Fifth, judicial contests are by their nature episodic and adversarial. Due to the retrospectivity of the process and the focus on adjudicative facts, the judicial operation is not well suited to the production of statements of policy of general prospective application.[71] Further, continued resort to the judicial system promotes competitive behavior at the expense and often to the exclusion of cooperative action.[72] When persons perceive themselves as confronted with con-

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67. State v. Baker, 81 N.J. 99, 405 A.2d 368 (1979).

68. For a typical article promoting advocating techniques, see Lappincott, *A Sanctuary for People; Strategies for Overcoming Zoning Restrictions on Community Homes for Retarded Persons*, 31 STAN. L. REV. 767 (1979). *See also* 71 A.L.R. 3d 693 (1976); WILLIAMS, *supra* note 62 at 52.01. For an interesting linguistic analysis of family, see Brussack, *Gray homes, Families and Meaning in the Law of Subdivision Covenants*, 16 GA. L. REV. 33 (1981-82).

69. *See supra* note 1 and accompanying text.

70. *See supra* note 3 and accompanying text.

71. *C.f.* S.E.C. v. Chenery Corp., 332 U.S. 194 at 198, 203 (1947). *See also* K. DAVIS, ADMINISTRATIVE LAW (1972).

72. A study of perception of staff roles in community residential facilities found that:

> When respondents (staff of facilities) were specifically asked to state their training responsibilitues, the majority (65.9%) indicated encouraging residents'

flict, they draw their resources around them; their instincts turn to self-preservation. They are, customarily, less altruistic, less humanitarian, less beneficent and less humane. Actually, the judicial process could not operate absent this egocentric attitude. Unfortunately, the threat of judicial action has been used by advocates as a bludgeon to intimidate.

In many communities, lines of interaction that could be used to promote positive long term goals have been broken and funds that might have been better spent on programs of education of the community or service to the disabled are wasted on incontinent adjudication. Therefore, to the extent that decisions adequately analyze the functions of a particular living arrangement and match those with the quality of the existing environment through applications of a developed, cogent and articulated theory, they contribute to a strong comprehensible social fabric. To the extent that analysis or continuity are deficient, the social fabric is torn.

A. The New York Experience

An example demonstrating the difficulties encountered by a court juggling inconsistent social goals while attempting to articulate intelligent legal theory can be found by examining New York case law.

In *City of White Plains v. Ferraioli*,[73] the issue was whether a group home consisting of a married couple and their two children and ten foster children was permissible in an area designated for single family units. "Family" was defined by the applicable ordinance as one or more persons limited to the spouse, parents, grandparents, grandchildren, sons, daughters, brothers, or sisters of the owner or the tenant or of the owner's spouse or the tenant's spouse

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capacity for independent living as a primary training activity. Other frequently mentioned areas included the development of resident self-care skills and the encouragement of residents' ability for self-direction. Examples in the miscellaneous category included: scheduling, advocacy, program development and implementation, and basic household maintenance.

Respondents' knowledge of basic training technology concepts was minimal. Less than 50% of the respondents correctly defined or provided examples of the basic training concepts listed with one exception: 62.2% provided correct examples of punishment. No respondent was able to identify all eight components of an individual habilitation plan (IHP) as contained in Public Law 95-602 (1978). Thirty-eight percent identified one to four components of an IHP. In contrast to knowledge of basic training technology skills, over 55% of the respondents correctly defined advocacy. Eighty-six percent provided appropriate examples of advocacy responsibilities they had performed for their residents such as identifying, locating, and enrolling residents in appropriate community service programs.

Slater & Bunyard, *Survey of Residential Staff Roles, Responsibilities,and Perception of Resident Needs*, 21 MENTAL RETARDATION 52, 55 (1983)[hereinafter cited as Slater & Bunyard, *Survey*].

73. 34 N.Y.2d 300, 357 N.Y.S.2d 449, 313 N.E.2d 756 (1974).

living together as a single housekeeping unit with kitchen facilities. Provision was also made in the zoning ordinance to permit up to two roomers and to accommodate other uses including welfare and philanthropic institutions.[74] Chief Judge Breitel, writing for the Court of Appeals, opined that while the goals of single-family living were legitimate and a municipality could limit the uses in residential areas to single-family units, it might be too restrictive to require that members of a family be related by marriage, consanguinity or adoption. He concluded that "so long as the group home bears the generic character of a family unit as a relatively permanent household, and is not a framework for transients or transient living, it conforms to the purpose of the ordinance."[75]

Four years later the court was confronted with a similar yet more expansive issue in *Group House of Port Washington, Inc. v. Board of Zoning and Appeals of The Town of North Hempstead.*[76] Judge Gabrielli, writing for the court, concluded that a group home created to house unadopted disturbed children was to be considered the functional equivalent or a family. It therefore met the definition of family, provided by the municipal ordinance, as "one or more persons related by blood, marriage, or adoption, residing . . . as a single housekeeping unit."[77] The court emphasized that the decision was to be limited to its facts and inferred that were the home to provide care for the delinquent or the mentally disturbed, a different result might be reached. Chief Judge Breitel did not join the majority. In a separate dissenting opinion he noted:

> [T]he proposed Port Washington home in key respects differs from a traditional family. Instead of one married couple, two alternating sets of persons, not specified as to sex or marital status are to be employed as "houseparents," one set for weekdays and the other set for weekends and holidays. Nor does it appear that the children could be effectively integrated into the community, assuming, dubiously, that that was intended. The goal of the home, and that of the psychiatric treatment given, is that the youngsters be returned to their own parents as soon as possible. . . . As opposed to a "relatively permanent" household, the framework of the Group House allows for, if it does not promote, the housing of transients. Indeed, the more successful the enterprise, the greater the movement in and out of the home.[78]

Notwithstanding the Chief Judge's participation in *Ferraioli*, in which the technique of statutory interpretation was utilized to per-

74. *Id.* at 305, 357 N.Y.S.2d at 451, 313 N.E.2d at 757.
75. *Id.* at 305-06, 357 N.Y.S.2d at 453, 313 N.E.2d at 758.
76. 45 N.Y.2d 266, 408 N.Y.S.2d 377, 380 N.E.2d 207 (1978).
77. *Id.* at 271, 408 N.Y.S.2d at 378, 380 N.E.2d at 208 (two boarders also permitted).
78. *Id.* at 275-76, 408 N.Y.S.2d at 382, 380 N.E.2d at 212.

mit operation of a large foster home, Judge Breitel was disturbed in *Port Washington*, "by an evasive process, to stretch the liberal interpretation to still another and even more liberal application. . . ."[79]

In conclusion, the Chief Judge expressed concern for the future of the single-family form of living:

> While any number of homes designed to conform practically with a community zoned for single-family homes should not be objectionable, a like number of homes resembling the Port Washington facility could, perhaps irreversibly, undermine the stability and tranquil atmosphere to which the majority opinion refers in discussing the *Belle Terre* case.[80]

Finally, and as a sequel to the debate on this issue within the Court of Appeals, the court in *New York v. St. Agatha Home for Children*[81] held that a state law requiring counties to establish nonsecure detention facilities for young offenders authorized, sub silentio, the creation of privately operated facilities in single-family residential areas. Further, the court concluded that a county decision to permit such facilities could not be overruled by a local zoning ordinance. Of interest is that Judge Breitel was no longer a member of the court and Judge Gabrielli joined in the decision, notwithstanding his expressed concern with permitting detention homes in single-family residential area. The cases exemplify the difficulties which courts encounter when functioning in a void of efficacious and perfected policy.

B. The Pennsylvania Experience

The Pennsylvania courts have assumed a rather temperate posture on the use of a single-family dwelling by a nontraditional unit. While the judicial lodestar has expectedly been patent association content, the decisions evince respect for traditional family functions. The germinal case on the subject is *Children's Aid Society v. Zoning Board of Adjustment.*[82] There, the petitioner sought to utilize a detached single-family dwelling as a residence for a couple and six foster children. Since the individuals who would use the dwelling did not constitute a family under the applicable zoning ordinance, the Children's Aid Society requested a use certificate as a charitable institution. The Zoning Board denied the application on the grounds that the Society had not met its burden of proof under Section 14-1803(1)(d) of the applicable Philadelphia Zoning Ordinance. The

79. *Id.* at 277, 408 N.Y.S.2d at 383, 380 N.E.2d at 213.
80. *Id.* at 276, 408 N.Y.S.2d at 283-83, 380 N.E.2d at 212.
81. 47 N.Y.2d 46, 416 N.Y.S.2d 577, 389 N.E.2d 1098 (1979)(per curiam).
82. 44 Pa. Commw. Ct. 23, 402 A.2d 1162 (1979).

qualities explicated in the ordinance were predominantly *physical*, and the type of certificate at issue would have been issued in ordinary course absent facts that the application would prove injurious to the articulated public interest. The Commonwealth Court found uncontroverted evidence that the *physical* use of dwelling would be identical to that which would exist were the property utilized by a traditional family with six children, and therefore, met the demands of the ordinance. The court explicitly noted that it was not necessary to evaluate the case on constitutional grounds, and did not discuss the qualities of family life.

Lakeside Youth Services v. Zoning Hearing Board of Upper Moreland[83] was the first in a series of cases which addressed the quality of life internal to the proposed unit. In declining to permit a home for delinquent young females in court custody within a single-family residential zone, the Commonwealth Court concluded:

> The record shows that Lakeside's home would accommodate six adjudicated young women referred by the courts; that the average stay for each subject would be six months to a year and that after that period if all went well she would be transferred to, as Lakeside's principal witness pointed out, an "even more home-like" situation. In addition to live-in houseparents and a permanent daytime support staff of caseworkers, the six young women would be regularly visited by a psychologist and psychiatrist. . . . (I)n view of the transient nature of the principal residents the basic social structure of the proposed use is simple too far removed from the . . . concept of "single-family dwelling". . . .[84]

The first Pennsylvania case to address the constitutionality of restricting occupancy of a single-family dwelling to persons related by blood or marriage was *Children's Home of Easton v. City of Easton.*[85] In holding the ordinance unconstitutional as applied the Commonwealth Court found that a unit consisting of three foster children, foster parents and their two natural children was a family. The uncontradicted testimony indicated that the foster family was *functionally* similar to a natural family. The court noted certain equivalents:

> There would be no professional counselors involved, nor any "days off" for the foster parents. The "hope" would be that the foster children would remain in the home until after graduation from high school. The foster parents would be expected to provide all the services that would be expected from natural par-

83. 51 Pa. Commw. Ct. 485, 414 A.2d 1115 (1980).
84. *Id.* at 489, 414 A.2d at 1116.
85. 53 Pa. Commw. Ct 216, 417 A.2d 830 (1980).

ents. They would serve in a "nurturing, supervisory and caring role." In sum, the foster parents *in this instance* would be the *functional* equivalent of a biologically related family.[86]

The scope of the decision, however, is telling: it reaffirms the necessity of examining the content and purpose of the applicable ordinance as well as the details of the proposed residential use to ascertain their compatibility. Significantly, the only state interest asserted by the City of Easton in restricting use to related individuals was that of population density control.

A similar ordinance defining a family as one or more persons related by blood, adoption, or marriage was determined to be unconstitutional as applied to a husband and wife living in leased premises with three mentally-retarded children in *Hopkins v. Zoning Hearing Board of Abington Township.*[87] The court again considered the external functional qualities of the subject group and observed that the use of the property had not actually caused any problems different from those caused by families with related children. "Here, Appellees seek to set up a family life *as nearly normal as possible* with their three handicapped children in their care. Appellees' use of the property is consciously *striving to mirror* the residential family life that surrounds them. . . ."[88] The court delicately balanced the needs of a traditional family setting and the state interest in providing for its disabled citizens. Conspicuously absent was a discussion of two seminal features. First, the particular community living arrangement was part of a program developed by the State of Pennsylvania to place persons disabled by mental retardation into a family setting. Second, the nature of the relationship was essentially proprietary; one of the appellees was hired to serve as a house parent. It is apparent from the decision that the size and stability of the unit persuaded the court that to apply a biological standard would present an unreasonable burden to the parties. The decision did not address the possible preemption of local initiative by state policy in favor of community living.

A number of the questions that remained in *Hopkins* were ventilated in *In Re Appeal of Theresa McGinnis.*[89] Ms. McGinnis purchased a residentially zoned property in 1979 and, together with five elderly persons, began inhabiting the property shortly thereafter. The relevant zoning ordinance permitted occupancy of a single-family dwelling by persons related by blood, marriage, or adoption; or by

86. *Id.* at 219-20, 417 A.2d at 832 (emphasis added).
87. 55 Pa. Commw. Ct. 365, 423 A.2d 1082 (1980).
88. *Id.* at 369, 423 A.2d at 1084.
89. 68 Pa. Commw. Ct. 57, 448 A.2d 108 (1982) *cert. den. sub nom.* McGinnis v. Langhorne Manor Borough, ___ U.S. ___, 103 S.Ct. 2121 (1983).

a group, not in excess of five members, who live together in a single nonprofit unit and who maintain a common household. Ms. McGinnis claimed that the ordinance restricting use to traditional families was unconstitutional. The court, citing *Village of Belle Terre v. Boraas*,[90] held that "no persuasive reason has been offered why a municipality . . . may not constitutionally prohibit the cohabitation of six unrelated older persons."[91] The living arrangements in *McGinnis*, unlike those in *Hopkins* and *Children's Home of Easton*, embodied no permanent commitment on the part of the residents:

> Each resident is free to leave at any time unfettered by the legal, social and moral bonds—including those bonds created, for example, by a commitment to the task of child rearing—that import greater stability to nuclear families. In sum, each of these cases must turn on its facts and, with the exception of age of the residents, the living arrangement here involved is very much like that of *Belle Terre* and unlikely to be mistaken for a nuclear family.[92]

Further, overwhelming evidence showed that the arrangement possessed a commercial flavor incompatible with single-family residential character. Occupants were charged a daily rate which varied according to the services provided. A nurse's services were included. The operation was described as a residential home and was treated as a business for federal income tax purposes. Included among the deductions were advertising expenses, depreciation, licenses, wages, and repairs. These, of course, would be unavailable to a usual taxpayer consuming as opposed to investing in housing services.

Finally, that the services provided were in accord with statements of policy attributed to the Commonwealth Department of Aging did not influence the court: "[T]he issue is not whether Ms. McGinnis ought to be permitted to carry on her useful vocation but whether it is within the power of the municipality to exclude commercial activities from residential zones."[93]

The most recent judicial activity in this arena is *Owens v. Zoning Hearing Board of Norristown*.[94] The Commonwealth Court held that a boarding house occupied by seven unrelated adults who participated in Norristown's State Hospital's day treatment program could constitutionally be excluded from single and two-family residential areas. The court concluded that the for-profit commercial endeavor was unsuited to the values of family life notwithstanding its

90. 416 U.S. 1 (1982).
91. 68 Pa. Commw. Ct. at 66, 448 A.2d at 112.
92. *Id.* 67, n.2, 448 A.2d at 113, n.2.
93. *Id.* at 70, 448 A.2d at 114.
94. 79 Pa. Commw. Ct. 229, 468 A2d. 1195 (1983).

connection with state goals of rehabilitation.

VIII. The Legislative Initiatives

In an attempt to resolve a number of the difficulties of residential placement of disabled citizens, several states have promulgated statutes defining certain community living arrangements as single-family uses, notwithstanding zoning ordinances to the contrary .[95] An articulated purpose of the legislature is to vitiate the negative stereotype of incapacitated persons to secure to that class reasonable benefits of habilitation.[96] In the process, however, legislatures merely replaced one stereotype with another. The new presumption is that occupation of a dwelling unit by the designated number of individuals will create the essential equivalent to a family. Such legislation may be deficient in one of four ways, however.

First, classification on the basis of numbers of occupants is arbitrary, overbroad, and not rationally related to the legitimate state goals of providing competent housing services to the handicapped while simultaneously securing reasonable residential areas to the general population. While density is an important feature in evaluating the qualities of family life, it is certainly not the delimiting definitional factor.[97] Any cogent theory of family must be sensitive to the myriad indicies of value content. Family is not an oceanic feeling but a precious and detailed social rudiment. Preservation of its form is indispensable to any program of habilitation in which normalization is a goal and traditional social structures are the models toward which it aspires.

Second, the number of residents permitted, usually between six and twelve exclusive of staff, is substantially higher that is traditionally found in comparable dwelling units.[98] Such high density not only diminishes the capacity of the arrangement to provide the emblements of family life to the residents, but also distinguishes it from other "families" in the neighborhood with which it might otherwise identify. The increased density frustrates the internal and external integration of the members.

Third, insofar as concentration of living arrangements rest upon considerations of cost efficiency, they neither serve the best interest of the clients nor the neighborhoods into which they are placed.

Last, these statutes demonstrate a failure to appreciate the na-

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95. *See* MICH. STAT. ANN. 5.2963 (16a)(2)(Callaghan 1982); COLO. REV. STAT. § 31-23-301(4) (1977 Repl. Vol. 12).

96. Adams Co. Ass'n for Retarded Citizens, Inc. v. Westminster, 196 Colo. 79, 580 P.2d 1246 (1978).

97. E. HALL, THE HIDDEN DIMENSION (1969).

98. *See supra* note 95.

ture and extent of the proposed residents' disabilities.[99] Some citizens suffer from social ills and such a facility would serve a low security detention function or as a vehicle to reintegrate such persons into the mainstream of social life. Others are physically, mentally, or emotionally devitalized, needing specialized care or rehabilitative services. Still others are in need because of disintegration of their primary family unit. Each group has unique requirements. Nothing short of a tailored cooperative community effort will adequately satisfy each group's essential demands. Actually, a community residential facility (CRF) might be neither the least restrictive[100] nor most normalizing environment for a particular individual.

A. Restrictiveness

For example, principles of meaningful freedom for retarded and other persons may be substantially different:

> [H]ow do we determine "restrictiveness"? It may be naive to assume that the most "normative" setting is necessarily the least for everyone. What feels restrictive to one person may feel unconstraining to another. A wheelchair is a restriction to an ambulatory person, but it provides increased freedom to a paraplegic. The problem is especially complicated for persons suffering sensory or cognitive impairment. A setting which provides freedom to a nonhandicapped person may be more restrictive to a handicapped person than a specially designed prosthetic environment. And the problem is more complicated still when the least restrictive alternative test is applied to the larger social environment in which a retarded person lives as opposed to facilities designed for specific programs. A small group home nestled in a hostile neighborhood, even if honorifically labeled as "community care," or a place "in the community," may be considerably more restrictive to its residents than a small village-type facility in which retarded residents are full participants in their own "community," even if some might call that community an "institution." The ultimate complexity of the least-restrictive alterna-

99. *See generally*, Briefs for Amici Curiae Congress of Advocates for the Retarded, Inc., and American Psychiatric Association, Pennhurst State School and Hospital v. Halderman, 104 S.Ct. 900 (1984). *See also* A. BAUMEISTER & E. BUTTERFIELD, RESIDENTIAL FACILITIES FOR THE MENTALLY RETARDED (1970); M. BEGAB & S. RICHARDSON, THE MENTALLY RETARDED AND SOCIETY: A SOCIAL SCIENCE PERSPECTIVE (1975)[hereinafter cited as BEGAB & RICHARDSON]; 1-3 RESEARCH TO PRACTICE IN MENTAL RETARDATION (Mittler ed. 1977); Dalgleish, *Assessment of Residential Environments for Mentally Retarded Adults in Britain*, 21 MENTAL RETARDATION 204 (1983); Slater & Bunyard, *Survey*, *supra* note 72, at 52; Janicki, Mayeda & Epple, *Availability of Group Homes for Persons with Mental Retardation in the United States*, 21 MENTAL RETARDATION 45 (1983); Jacobson & Schwartz, *Personal and Service Characteristics Affecting Group Home Placement Success: A Prospective Analysis*, 21 MENTAL RETARDATION 1 (1983).

100. For authority requiring the state to adopt a least restrictive environment approach, see In re Schmidt, 494 Pa. 86, 429 A.2d 631 (1981).

tive analysis, however, may be that restrictiveness and freedom are experiences of individuals and that categorical determinations of these matters will always be clumsy.[101]

While a well planned appropriately placed community living arrangement can be a citadel of freedom, poorly integrated group homes may create "socially isolated total institutions within the community."[102] Moreover, ". . .a small group home for six retarded persons can be a pleasant family-like place, but it can also be a ghetto, where handicapped persons live out their lives without the necessary special services and without the sympathy of their neighbors."[103]

The degree of restriction in any facility depends upon its organization, its administration, its management, and the surrounding environment. Freedom does not necessarily inhere in any particular residential form: "[D]oors in any institution can be locked, closed or open. Comings and goings can be stopped, intermittent or free. Institutions can be throttling, regulating or permissive. They can defeat, bore, or enrich. They can kill. They can stultify. They can enliven."[104]

B. Normalization

Much of the foregoing indicates that living arrangements not in harmony with the community will have little normalizing effect. Further, the environment outside the home is of little consequence unless the resident can interact with it:

> In order to provide a normalizing environment, community care facilities must provide an environment which is actively enriched both with internal programs and external contact and exchange.
>
> While this is obvious in large facilities, it is particularly critical in small care facilities, which, by virtue of size, must include activities and external interaction to approximate a normal environment. Isolation in small care facilities results in a social setting populated only by developmentally disabled persons, thus restricting activities, the number of role models, and experiences necessary for normalization to occur.[105]

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101. Roos, *The Law and Mentally Retarded People: An Uncertain Future*, 31 STAN. L. REV. 613,622 (1979).

102. Butler & Biannes, *A Typology of Community Care Facilities and Differential Normalization Outcomes*, in RESEARCH TO PRACTICE IN MENTAL RETARDATION 342 (Mittler ed. 1977)[hereinafter cited as Butler & Biannes].

103. M. Egg-Beres, *Integration of the Mentally Retarded in Society*, in 1 RESEARCH TO PRACTICE IN MENTAL RETARDATION 352 (Mittler ed.1977.)

104. J. Throne, Is Deinstitutionalization Dictated by the Least Restrictive Principle? (paper presented at the Meeting of the American Association on Mental Deficiency 1979) *cited in* Brief for Amicus Curiae Congress of Advocates for the Retarded, Inc., Pennhurst State School v. Halderman, 104 S.Ct. 900.

105. Butler & Biannes, *supra*, note 102, at 345.

Unquestionably, the handicapped can and should be treated more normally than they have been. To treat them as if they are already normal may not be to develop their capacities to the fullest, however. Care must be personalized. A legislative standard should neither be crafted to expiate social guilt or be held a panacea for past ills. The integrity of the citizen together with that of the community should be paramount. Any truly viable proposal should secure the human dignity of all participants and preserve "the ability to form peer groups for the patients, groups where they are no longer the least efficient member and where they are not ridiculed because of their inadequacy."[106]

Finally, community living arrangements have proven incapable of providing comprehensive care or programming adequate to the needs of the participants. The marked heterogeneity of the relevant populations militates against any single pattern of care. Further, comprehensive services are "logistically difficult to provide in scattered facilities serving individuals or small groups."[107]

Obviously, a community living arrangement serving a handful of residents cannot provide the necessary services itself. Nor can it safely rely on services in the community, because retarded people require the care of specialists. This is true not only for those services most directly associated with the retarded (such as unique educational programs, therapy, etc.), but also for virtually all the services a retarded person needs. For example, even for what would ordinarily be a routine illness, a general practitioner in the community is likely to experience great difficulty in attempting to treat a profoundly retarded adult with multiple disabilities who cannot describe his symptoms, whose behavior may be erratic, and whose disabilities are likely to be unfamiliar to the doctor.[108] Even were it possible to provide the necessary specialized services at sites in the community, assuring the residents of each of the separate community living arrangements access to those services as needed would be extremely difficult.[109]

Further, from the view of those charged with providing care, the salaries are low, opportunities for advancement few and the demands of employment provide little personal privacy.[110] The result is a po-

106. D. Primrose, *Asylum*, in 1 RESEARCH TO PRACTICE IN MENTAL RETARDATION 26 (Mittler ed. 1977).

107. M. BEGAB & S. RICHARDSON, *supra*, note 99, at 18.

108. *See* J. Clements, *Medical Services in Institutions for the Mentally Retarded*, in RESIDENTIAL FACILITIES at 317-18.

109. Brief for Amicus Curiae Congress of Advocates for the Retarded, Inc., p. 16, n. 23, Pennhurst State School & Hosp. v. Halderman, 104 S.Ct. 900 (1984).

110.

> As early as 1970, Scheerenberger. . . noted in a review of community services that generic community services are staffed with personnel who have limited

tential for significant staff turnover.[111] Such a situation is unsatisfactory in assuring the continuity of care necessary for successful rehabilitation and normalization.

C. Statutory Limitations

In any discussion of community living arrangements, there is virtual unanimity in perceiving the peerless existence and cultural value of the family. Facilities are often located deep within residential areas in order to take advantage of the patent and latent value content as expressed in the community through the concentration and association of residential units of similar character. Furthermore, group homes, depending upon their composition, may not be capable of exhibiting the same value content. "Far too much debate over the rights of the mentally disabled has revolved around the effort to discredit 'institutionalization.' Yet for those familiar with care settings, affixing labels is the beginning rather than the end of the inquiry." [112] One commentator has observed that,

> [t]he distinction between institutions and community is a false one. A human community is composed of people and their institutions . . . Small and medium sized community-based residential facilities, group homes, and foster homes are institutions too. . . . The issue is not one of institutionalization versus deinstitutionalization. . . . The issue is what kinds of institutions

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knowledge of handicapping conditions, particularly severe forms of mental retardation. Studies that have investigated general characteristics of residential primary care providers indicate that on the average these individuals have twelve years of education, enjoy working with mentally retarded persons, and usually accepted the job for personal satisfaction.

. . . .

In addition, a nationwide survey of 2,000 community residential facility administrators reports staffing and personnel areas such as recruitment of qualified staff, reduction of turnover rates, and staff training as the most frequently identified problems in residential settings. . .(citations omitted). . . As Lakin, Bruininks, Hill, and Hauber. . . note, the rate of direct-care staff turnover is one of the most serious problems in the provision of residential care. Public expense results from high staff turnover. . . (citations omitted). . ., and even greater costs are incurred when the effects of high staff turnover rates on the quality of care offered are considered (citations omitted). . .

. . . .

Developing a well-trained residential staff is a goal that may prove to be one of the most difficult to meet challenges in the development of a community-based service system for developmentally disabled individuals. High staff turnover rates aggravated by limited training opportunities and a perception by staff as fulfilling basically a maintenance role reduce the possibilities of having a positive effect on residents most in need.

Slater & Bunyard, *Survey*, *supra*, note 72 at 53, 57.

111. "In the five-county area served by Pennhurst, the average duration of employment of a CLA staff person is six months." I, Longitudinal Study of the Court-Ordered Deinstitutionalization of Pennhurst: Historical Overview at 84 (1980).

112. Brief for Amicus Curiae American Psychiatric Association, Pennhurst State School & Hosp. v. Halderman, 104 S.Ct. 900.

best serve. . . .[113]

In recognition of this character, many statutes place limits on the number of facility units that might occupy a given geographic area.[114] At least two reasons support these provisions. The first is to assure that any adverse impact of group homes is dispersed and that its intensity is minimized. This is to protect, as far as is practical, the residential integrity of the neighborhood.

The second is a recognition that a concentration of facilities would create an institutional care environment and adversely impact their ability to access family values. As when a pebble is tossed into a pond, the impact is greatest at the focus and the influence dissipates as the concentric circles grow. A CRF gains its greatest value from the families closest to its location. In return, these families surrender the greatest value and experience the greatest disruption if the unit does not possess and promote the traditional value content. The force of placement, either positive or negative, is transferred to the immediate environment. In addition, the more distant the location the weaker the ripple. Ultimately the disturbance becomes so small that it blends with the tide of traditional social dynamics. Further, just as the temptation is great to select the calmest and clearest pond so as to maximize the effect of the toss, so too is it tempting to place a non-conforming group home in the deepest residential setting.

D. Constitutional Limitations

1. Taking Clause.—A provision for placement of CRF's through preemption of local initiative may be taking of property without just compensation under the Fifth and Fourteenth Amendments of the United States Constitution.

Valuable interests are indisputably transferred. But questions may arise whether they are to be considered property and, if so, of any economic value. The Supreme Court has not cowered in recognizing intangible interests, frequently emphasizing that property within the context of the "taking clause" includes all the distinctive corporal attributes and qualities. Property is not to be limited in the

> . . .vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] . . . denotes[s] the group of rights inhering in the citizen's relation to the physical thing as the right to possess, use

113. Throne, *Deinstitutionalization: Too Wide a Swath*, 17 MENTAL RETARDATION 171 (1979) *cited in* Brief for Amicus Curiae American Psychiatric Association, Pennhurst State School &. Hosp. v. Halderman, 104 S.Ct. 900.

114. *See supra* note 95.

and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess.[115]

The property herein is either an accessory to the use of residential real estate or those values of family and neighborhood identification expressed through occupancy of residential real estate, the financial worth of which is measured by the value of real estate.[116]

The intangibles, of course, have demonstrable economic worth. Group homes are placed in certain areas in order to exploit defined qualities that the group home cannot economically produce.

Information is available on the impact of CRF's on neighborhood property values; the studies disagree, however, on the *quality* impact. In *Garcia v. Siffrin Residential Association*,[117] the Supreme Court of Ohio held that eight or fewer mentally retarded persons who were occupy a residence were not reasonably included within the definition of a family set forth in the city zoning ordinance. The court further held that adjacent property owners would suffer a lowering of value of their property if residential facilities for mentally retarded persons were permitted in that area.

On the other hand, an analysis of Minnesota property values as affected by the placement of CRF's indicates no substantial impact on value.[118] However, this study, like most, is general in attitude, does not specify the character of the group homes addressed or the character of the neighborhood affected, and uses questionable measures of value. Unfortunately, after lengthy analysis, the Minnesota study concludes:

> While the results of this analysis unequivocally supports this conclusion (change in property values are not related to the presence of a group home) there are limitations to this data. First, assessed value (the measure of value used in the study)

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115. United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945).

116. This imputed value may be likened in some ways to liberty under the United States constitution. "[T]he Due Process Clause is triggered by a variety of interests, some much more important than others. These interests have included a wide range of freedoms in the purely commercial area such as the freedom to contract and the right to set one's own prices and wages." Moore v. City of East Cleveland, 431 U.S. 494, 545 (1977)(White, dissenting). In Meyer v. Nebraska, 262 U.S. 390 (1923) the Court took a characteristically broad view of "liberty:"

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 399.

117. 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980).

118. Study obtained from Cumberland Perry Association for Retarded Citizens, Carlisle PA 17013 (1983).

> may be an imperfect measure of market value. . .Second, because many of the group homes in the sample were established after 1979, the small number of property transactions may reflect a general downturn in the housing market rather than satisfaction of property owners with their new group home neighbors.[119]

Group home advocates often explain the apparent inconsistency by concluding that if a potential buyer seeking a family residential experience were aware of the existence of a CRF in the neighborhood, it might adversely affect his decision to buy, and thereby lower values. If he were not aware of the existence of the CRF, it would not. The studies finding no impact usually rested upon an expectation that a buyer is unaware of the existence of a CRF in the neighborhood where he chooses to buy. The point being promoted is that the care taken of the physical property external to the household is indistinguishable from other properties in the neighborhood. Discussion of the intangible social qualities is avoided.

It seems apparent that CRF impact on property values would be appropriately measured only by a standard of fair market value. Such a criterion requires a willing buyer and a willing seller, neither being under compulsion to buy or sell and each possessing reasonable information about the character of the property and the transactions. Measures that are not sensitive to complete information or measures such as replacement value or assessed value are not adequate.

Therefore, value is a relative question of fact, not necessarily determinative of the issue of taking. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*,[120] the Supreme Court found a per se taking in the de minimis physical occupation of one-eighth cubic foot of roof space by a television cable.

The Fifth Amendment reads in part: "nor shall private property be taken for public use, without just compensation." The Supreme Court has consistently recognized [121] that this guarantee

> . . .was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.[122]

In applying this policy, the Court's decisions have identified several significant factors:

> The economic impact of the regulation on the claimant, and particularly, the extent to which the regulation has interfered

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119. *Id.*
120. 458 U.S. 419 (1982).
121. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419; Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978)
122. Armstrong v. United States, 364 U.S. 40, 49 (1960).

with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.[123]

The placement of CRF's may result in a non-consensual servitude of adjacent properties borne disproportionately, if at all, by other properties of similar character. Further, insofar as the facility is permitted to locate within any zone, it is the antithesis of a comprehensive plan of land use control and may be likened to discriminatory reverse spot zoning:

> [W]here government prohibits a noninjurious use, the Court has ruled that a taking does not take place if the prohibition applies over a broad cross section of land and thereby "secure(s) an average reciprocity of advantage. . ." (citation omitted) It is for this reason that zoning does not constitute a "taking." While zoning at times reduces individual property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another.
>
> Here, however, a . . . loss has been imposed. . .[I]t is uniquely felt and is not offset by any benefits. . . .It is exactly this imposition of general costs on a few individuals at which the "taking" protection is directed. The Fifth Amendment "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."(citation omitted). . .[124]

Not only are such adjacent residents asked to contribute value content, but they do so on behalf of government in favor of private third parties. "[S]uch an occupation is qualitatively more severe than a regulation of the *use* of the property, . . . since the owner may have no control over the timing, extent, or nature of the invasion."[125]

The taking is dramatically demonstrated by the high residential density permitted in group homes. Greater numbers of residents make administration of a residential facility more economical. The cost of efficient management is shifting to the neighborhood where the facility is located. "Police power regulations . . . can destroy the use and enjoyment of property in order to promote the public good

123. Penn Central Transp. Co. v. New York City, 438 U.S. at 124.
124. *Id.* at 147 (Rehnquist, J., dissenting).
125. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. at 436 (emphasis in original)(1982).

just as effectively as formal condemnation or physical invasion of property."[126]

Finally, the property owner is under a duty, at the risk of personal loss of value to his property, to maintain the therapeutic environment. The zoning code that remains in place usually limits the private use of a dwelling to a traditional single family. It does not permit private property owners in residential districts use of their properties comparable to that of the CRF. If, for the purpose of argument, it is possible to assume that a CRF has an adverse impact on the neighborhood in which it is located, a residential owner could readily compensate for the loss. Under certain statutes, CRF's would be able to house up to fourteen unrelated persons. As a general rule, owners in residential areas could not respond by renting or selling their units to a similar number of unrelated persons. A property owner must sell, rent, or occupy his property as a single-family unit notwithstanding a decrease in the market value for the property as a single-family dwelling. Essentially, the CRF might change a neighborhood to one more suited to multi-family or institutional use, yet simultaneously restrain a property owner from converting to that use.

On the other hand, if residential owners were allowed to readily convert, a municipality might find that it would rapidly lose the single-family quality of some of its neighborhoods, a quality already noted as potentially indispensible to the maintenance of the polity. Finally a statute that provides that group homes may not be located within a prescribed distance of one another, restrains a person, to the benefit of a particular CRF, from renting, selling or converting the property to a CRF.

Certainly, when an individual purchases a dwelling in a residential environment, he reasonably expects that the investment would permit access to traditional family values. Governmental action materially frustrating that expectation might reasonably be considered a compensible taking.

2. Unlawful delegation of legislative power.—A provision that CRF's may be placed in any zone including that restricted to single-family dwellings may be an unlawful delegation of legislative power, without standards, to private third parties. Zoning restrictions aim to advance a plan of comprehensive use for the common good of all community members. "Under our constitutional assumptions, all power derives from the people"[127] who may delegate it to representa-

126. San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621, 652 (1980)(Brennan, J., dissenting).

127. East Lake v. Forest City Enterprises, Inc., 426 U.S. 668, 672 (1975).

tives to allocate the benefits and burdens to property, presumably without discrimination. Insofar as a private, non-governmental entity can make decisions of distribution, it usurps governmental sovereignty. The Supreme Court in *Carter v. Carter Coal Co.*[128] held that a delegation of legislative power to private parties offends the theme of a democratic republic and therefore unconstitutional. The Court concluded:

> The power conferred . . . is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most offensive form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. . . . And a statute which attempts to confer such a power undertakes an intolerable and unconstitutional interference with personal liberty and private property.[129]

Further, the delegation to select a site for a facility may be without any standards or guides. Courts have frequently held that delegations to government agencies should be accompanied by discernible standards in order that the conduct of the delegee may be evaluated and constrained within the will of the legislature. Absent such standards, agencies not only perform legislative functions but are heir to legislative power.[130]

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128. 298 U.S. 238 (1935).

129. *Id.* at 311.

130. On a related topic, see Commonwealth of Pennsylvania, Dep't of Gen. Serv. v. Zoning Bd. of Adj. of Philadelphia, 73 Pa. Commw. Ct. 525, 459 A.2d 50 (1983), *appeal docketed* No. 114-116, E.D. Appeal Docket 1983, which is currently before the Pennsylvania Supreme Court. The Department of Public Welfare sought a variance from the Philadelphia Zoning Board of Adjustment to permit location of a workshop facility for the mentally handicapped in a residential zoning district. The Zoning Hearing Board denied the request, and the Commonwealth of Pennsylvania appealed to the Court of Common Pleas. That court reversed the Board's determination. The Neighbors Association and the Board appealed. The equally divided Pennsylvania Commonwealth Court affirmed the decision of the Court of Common Pleas. *See* 73 Pa. Commw. Ct. 525, 459 A.2d 50.

The fundamental question now before the Pennsylvania Supreme Court is whether the Legislature, by enacting § 202 of the Mental Health and Retardation Act (MHRA), PA. STAT. ANN. tit. 50, § 4202 (Purdon 1969), superseded the legislative grant of zoning authority to the City of Philadelphia. (Section 202 of the MHRA permits the Department of Public Welfare to lease or otherwise acquire facilities through the Department of General Services). Certain observations may be offered.

First, § 202 of the MHRA contains no express statement of preemption of local zoning initiative. One might compare the legislative statement in § 202 to those in other jurisdictions which assert that community residential facilities may be located in residential areas notwithstanding zoning limitations.

Second, it would be reasonable to conclude that the legislature was cognizant of land use considerations when drafting § 202 of the MHRA and its grant of zoning authority to Philadelphia. The grant stated, in part: "Whenever the regulations made under the authority of this [Zoning] Act require. . .or impose other standards than are required in any other statute. . .the provision of the regulations made under authority of the Act shall govern." Had the Legislature intended to preempt local initiative, it could have expressly so provided. It has apparently permitted zoning superiority to remain intact.

3. Special laws.—A statute granting power to select private persons to determine placement of community living arrangements may be a special law prohibited by, or lack the uniformity required by, state constitutions. The Supreme Court of Ohio, considering such a statute in *Garcia v. Siffrin Residential Association*,[131] concluded:

> [T]hese sections of law (relating to residential placement of group homes) selectively excise certain of the police powers of local government that have been granted to municipalities by the Constitution. Thus, such sections . . . are not general laws.
>
> It is in our view that [they] . . . suffer an additional infirmity in that they are special laws prohibited by . . . the Ohio Constitution. Such constitutional provision states, in pertinent part, that "all laws of a general nature shall have a uniform operation throughout the state. . . ."
>
> The requirement of uniform operation throughout the state of laws of a general nature does not forbid different treatment of

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Third, in City of Pittsburgh v. Commonwealth of Pennsylvania, 468 Pa. 174, 360 A.2d 607 (1976), the Supreme Court of Pennsylvania acknowledged that municipal corporations are agents of the state exercising subordinate powers. Therefore, a dispute between a municipality and a state agency cannot be resolved simply by suggesting that a state agency's decisionmaking supersedes municipal decisionmaking. In examining a number of additional cases involving conflict between municipal zoning laws and the ininitiatives of other public entities, the Pennsylvania Supreme Court, quoting the Supreme Court of New Jersey, noted:

> The question of what governmental units or instrumentalities are immune from municipal land use regulations, and to what extent, is not one properly susceptible to absolute or ritualistic answer. Courts have, however, frequently resolved such conflicts in perhaps too simplistic terms by the use of labels rather than through reasoned adjudication of the critical question of which governmental interest should prevail in the particular relationship or factual situation.

Id. at 180, 360 A.2d at 610 (*quoting* Rutgers, State Univ. v. Piluto, 60 N.J. 142, 150, 286 A.2d 697, 701 (1972)).

The Court concurred in *City of Pittsburgh* that there was no legislative intent to permit the Bureau of Corrections to establish a pre-release center in a residential neighborhood or [IN?] contravention of local zoning regulations. The court suggested that a grant of the power of eminent domain to a state agency *may* contribute to an indication of an intent to supercede local zoning initiative. The suggestion was founded upon Pemberton Appeal, 434 Pa. 249, 252 A.2d 597 (1969). In *Pemberton*, the court determined that § 702 of the Public School Code (24 PA. STAT. ANN § 7-702 (Purdon 1962)) "clearly and unequivocally vests precise and specific powers in the school district. . .*to locate*, determine, acquire and if necessary, condemn all real estate necessary for schools. And the township zoning regulation clearly is determining *location* of the schools. It thus cannot be squared with [The School Code]." 434 Pa. at 256, 252 A.2d at 600 (emphasis added). It was not only the power of eminent domain that dictated preemption but also the expressed legislative intent that the local school district have power to *locate* the school. Therefore, the power of eminent domain, like the power of acquisition included in § 202 of the MHRA, is a method by which government may gain title to property. It does not, *per se*, express a plenary power to determine the location. In addition, eminent domain is to be exercised in the public interest and land use controls are an expression of such interest. The power to establish workshops and a municipal power to zone should be determined to be of co-equal authority. Consequently, the statutes must be applied contemporaneously. Since workshops can be accomodated, in the public interest, in Philadelphia in conformity with the Zoning Code, there is no inherent incompatibility and no need to force a decision of supersession. In conclusion, since there is no express legislative interest in overriding zoning, the recommended approach would be to reconcile the interests in a cooperative manner by deferring to the legislature and encouraging it to continue to examine the public interest in this arena.

131. 63 Ohio St.2d 259, 407 N.E.2d 1369 (1980).

various or types of citizens, but does prohibit non-uniform classification is such be arbitrary, unreasonable or capricious.[132]

IX. Conclusion and Recommendations

The family is a unique and elemental integrant of the state. The symbiotic relationship between this smallest political unit and the progressively larger components such as neighborhood, community, and nation, results from complex psycho-social phenomena. While organic law has, times, obligated the state to curtail expression of select values transmitted through this vehicle of affiliation, such as racial, religious, and sexual discrimination, effectually, government depends upon the general integrity of the family unit for its continued existence.

In pursuit of the goal of habilitation and normalization of disabled citizens, the family residential environment is perceived as a peerless positive value. Group home advocates acknowledge:

> 1. that residential qualities exist;
> 2. that residential qualities develop spontaneously through the association of residential units of similar character;
> 3. that the qualities vary with the residential form;
> 4. that multi-family character varies from single-family characters; and
> 5. that the deepest residential quality develops when the influences of commercial, industrial and institutional uses are absent and use is exclusively single-family dwellings.

Implicit in the equation is the necessity of interfamilial identification. Intrafamilial character could not be maintained, much less developed, absent the psychogenetic quality. Appreciation of this distinctive feature has induced proponents of community living arrangements to conclude that concentrating such facilities in a given geographic area would diminish the required residential experience.

A major impediment to the provision of adequate housing facilities for the handicapped has been the demand for programs of substantive affirmative action. Expressed in the form of advocacy for or legislation permitting placement of community facilities in any area without consideration of the extrinsic or intrinsic qualities of either the arrangement or the neighborhood, the exaction responds to the needs of neither the proposed residents nor the adjacent owners or occupiers.

The key concern in defining the rights of the developmentally disabled to adequate habilitation — while assuring the continuation of a family environment — should not be the polemic debate over labelling the particular form of care facility. It should be vindicating

132. *Id.* at 271-72, 407 N.E.2d at 1378.

individual claims of quality of life.[133] An assessment of each patient's needs as compared to what identified community environments can reasonably provide is the principle concern. Therefore, the program should be one of procedural affirmative action.

Yet refining the duty to provide adequate housing to the handicapped does not permit the perception of operating in pristine surroundings. For example, in defining the contours of the least restrictive environment,

> it is vital to place that right in a meaningful clinical context. If such a right is to advance rather than imperil the welfare of the developmentally disabled, it must be understood . . . as a means to a more important end, habilitation. . . . [A] person's liberties though very important, are not the person's sole, or at times even his primary, interests. This is uniquely so for the retarded. Learned Hand asked "What do we mean when we say that first of all we seek liberty?" He answered in part, "freedom from oppression, freedom from want, freedom to be ourselves." The simple fact is that the retarded can be freed from the oppression of their bodily needs and helped to grown within themselves only through the intensive services of others, never by the mere negative rights and passive liberties which are the grist of natural law theorists. . . .For the retarded person, the truly significant meaning which can be given to the "least restrictive alternative" is the setting which does not unnecessarily restrict liberties and is most conducive to habilitation.[134]

Accordingly, any responsible program of procedural affirmative action would emphasize cooperation at the community level to identify the particular needs of proposed residents as well as the character traits of the living arrangement and suitably match those with the established uses. Community living arrangements must be intelligently integrated into a comprehensive plan of land use.

As the life style of a traditional family unit (single-family) differs from that of a group of young adults living together (multi-family or institutional), so the experience of a small number of foster children dependent upon two adults in an owner-occupied dwelling unit (single-family character) differs from that of a group of four to eight adults or young adults in a single structure (multi-dwelling character). Furthermore, the characteristics of many CRF's are not intended to be traditional residential. While they may desire to emulate *some* of the qualities of traditional residential living they do not aspire to mirror traditional single-family life. In fact, they are essen-

133. *See* Halderman v. Pennhurst State School & Hosp., 612 F.2d 95, 114 (3d Cir. 1979).

134. Brief for Amicus Curiae, American Psychiatric Association in Pennhurst State School & Hosp. v. Halderman, 104 S.Ct. 900.

tially institutional.

The myriad facility forms should be matched with the current uses with which they are most compatible. For example, a group home for mildly retarded adults or young adults may not intend to reflect the character of a single-family district. To the contrary, the interest in such a facility may be to echo the value content and life style of a unigenerational collection of individuals of similar age. Such a facility might better serve the residents as well as the community were it placed in a multi-family residential neighborhood. In addition, such considerations would tend to preserve the family environment for living arrangements that have a legitimate need for sharing patent and latent familial content.

Proposed "for-profit" uses should be heavily scrutinized to assure that any commercial nature of the enterprise is compatible with the area in which it is to be located. Insofar as business aspects are evident and would adversely affect residential areas, neighbors should not be asked to make an economic or social sacrifice to the economic benefit of that person or group proposing the for-profit CRF.

In evaluating a proposition, it would be relevant to inquire whether the property would be owner-occupied. If the person proposing the CRF is an absentee investor in housing services he is more likely interested in an economic return on his investment and less likely to be concerned with preserving residential values.[135] Commercial and investment motives are more appropriate in commercial/institutional districts.

Proposals should be scrutinized to assure that they are not actually institutional uses. A CRF with institutional or organizational support may be an extension of the institution. Insofar as the head of the "putative family" is an institution, its neighborhood interests may be impersonal. Those who make decisions about the CRF resemble an absentee investor. They do not usually mirror the values of an owner-occupier. The group or entity that establishes general policy for the CRF is off-site and may be inaccessible and unresponsive to the neighbors. In addition, an institution may be obligated to sacrifice the goals of a particular CRF for broader social or program goals. It may be impassive to the local resident group in favor of

135. Over 90% of CLA's are privately owned, and unlike large state institutions, these small enterprises frequently go out of business. Brief for Amicus Curiae, Congress of Advocates for the Retarded, Inc., Pennhurst State School & Hosp. v. Halderman, 104 S.CT. 900. *See also* BEGAB & RICHARDSON, *supra* note 99 at 16: "Some of the problems relevant to prolonged care, however, apply here (foster homes). . . Independent operators, often married couples seeking additional sources of income, offer little assurance of long range stability. The disruption impact to the retarded. . . and the community of precipitate closings can be very devastating."

response to a group more removed. Insofar as the organization supports more than one program or CRF, it will necessarily balance the needs of all programs in allocating the benefits to one program. This ability to spread risk among a group of facilities may result in a legitimate business decision adverse to a particular neighborhood.

Further, when an institution is the family head, the CRF may not intend to imitate traditional residential values. Such qualities as:

> 1. a rotating staff;
> 2. on-site medical or education services;
> 3. the hope or expectation that the residents will be short term occupiers;
> 4. lack of permanent live-in authority figures;
> 5. a desire to consume the benefits of a particular neighborhood without individual emotional or financial commitments to the future of that neighborhood;
> 6. a density higher than in a normal residential unit;
> 7. persons employed in the CRF as opposed to residing there; and
> 8. lack of intergenerational exchange of values,

indicate that such a CRF is more appropriate in an institutional district or in a high density residential area where the influence of commerce and institution have already affected the residential environment.[136]

Last, evidence exists that CRF's have historically cost less to administer than larger institutions.[137] A likely explanation is that such facilities rely more heavily on general community resources. Insofar as the the facilities' residents come from the community providing the services, that community equitably bears the burdens of care. If the proposed residents come from locations outside the relevant supporting tax base, the costs are distributed inequitably. Finally, in light of the demonstrated reduced cost, nothing justifies increasing the marginal population density in units that have a legitimate need for access for family values. Such increased density is a degradation of family environment and therefore a shifting of cost to adjacent property owners. A savings to the community is an expense to proximate property owners. In lieu of providing a scheme of compensation for such a taking of value, attention should be upon reducing the density in legitimate "family" environments. This will inure to the benefit of not only group home occupants but also those residents of the neighborhood in which group homes are located.

The issues are complex and the solutions are not easy. An intel-

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136. *See* Christ United Methodist Church of Bethel Park, 58 Pa. Commw. 610, 428 A.2d 745 (1981)(juvenile group home fell within description "institutional" and was not considered a single-family dwelling and thus was permissibly excluded from residential district).

ligent, cooperative plan can accomodate most if not all residential facilities with the least average sacrifice. Such a plan must identify the qualities of group facilities and match them with the qualities of the area in which they are to be placed.